Yusof bin Ahmad bin Talib & Ors v Hongkong Bank Trustee (Singapore) Ltd & Ors

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 878 OF 1987
CHAN SEK KEONG J
31 MARCH 1989

Trusts – Removal of trustees – Nomination of substitute trustees by retiring trustee – Whether nomination made bona fide – Whether nominated trustees fit and proper persons – Whether trustees should be resident in jurisdiction – Construction of trust deed – Policy of courts regarding residence of trustees – Trustees Act (Cap 337, 1985 Ed), s 40(1) – UK Trustees Act 1925, s 36

The settlor, by means of three settlements, settled a great number of immovable properties, all of which were situated in Singapore, on various trusts for his descendants, relations and charity. Under the first settlement ('the family settlement'), the net income of the settled property during the trust period (defined as the lifetime of the survivor of 37 named individuals plus 21 years less ten days) was to be divided between the settlor's issue for the time being per stirpes on protective trusts. At the end of the trust period, the corpus and income of the settled property was to be held in trust for the beneficiaries then living in the same shares as they enjoyed immediately before such date. The other two settlements were the relation settlement and the charity settlement. The three settlements were all closely linked. For example, the family settlement required that the trustees of the family settlement undertake the trusts of the relation settlement. Also, upon expiry of the trust periods of the three settlements, the corpus of each of them was to be held for the benefit of the beneficiaries of the family settlement then surviving. The current powers of investment of the trustees of the family settlement were extended by court orders which gave the trustees power to invest in immovable securities and trustee securities in Singapore, Malaysia, the United Kingdom and Australia. The main action in this case was commenced by the plaintiffs against defendant ('HBT') for (a) the removal of HBT as trustees of the family settlement; (b) the appointment of a trust company, British Malayan Trustees Ltd ('BMT'), as trustees in their place; and (c) all necessary and consequential orders. Later, five other beneficiaries joined the action as the second to sixth defendants and applied for an order that they be appointed as co-trustees with HBT. HBT then sent a circular to the beneficiaries proposing to resign as trustees and to select trustees for appointment in their place. The plaintiffs responded by filing a notice of motion for hearing of an injunction to restrain HBT from appointing new trustees pending the hearing of the action for their removal. This was adjourned to be heard at a later date. The second, fourth and fifth defendants responded to HBT's circular and offered themselves for selection as trustees. Later, in the course of proceedings, an application was made by HBT seeking orders of the court that (a) HBT be discharged as trustees of the family settlement ('the settlement') and (b) the second to fifth defendants be appointed as trustees in their place and (c) all necessary and consequential orders. This application was strongly opposed by the plaintiffs, who together with the seventh to ninth defendants, were in favour of BMT being appointed. The hearing of the main action was deferred until the hearing of HBT's application. HBT then made known their selection of trustees by filing S/C No 443 of 1989.

HBT has no beneficial interest in the settlement but all the plaintiffs and the defendants are income beneficiaries thereof. The plaintiffs and the seventh to ninth defendants, who are on the same side in opposition to HBT's nomination, represent about 62% of the income beneficiaries, while the second to sixth defendants represented about 38% of the beneficiaries. There were 79 beneficiaries at the time of the action. HBT's position before the court is that they are willing and able to exercise their statutory power of appointment of replacement trustees, but they sought the court's assistance to appoint their nominees in order to put an end to litigation by disputing beneficiaries on the issue of the sole trustee's power to appoint. The plaintiffs questioned the bona fides of HBT's nomination of trustees, pointing to the fact that this occurred sudddenly, shortly after the fourth defendant met an officer of the Hong Kong Bank (the holding company in HBT) in Hong Kong. HBT's reason for wanting to resign was that a substantial proportion of the beneficiaries wanted them to do so, yet HBT in its nominations did not give the same consideration to this substantial proportion of beneficiaries. Additionally, HBT decided to appoint from the preferred class of beneficiaries, which resulted in disqualifying both BMT as a candidate and the second plaintiff as a preferential candidate. HBT's nominees were alleged to be too young and inexperienced. The plaintiffs also pointed to certain events, including the non-disclosure of certain facts when the nominees applied for a court order to vary the trusts of the charity settlement, that they alleged showed the unfitness of the nominees of HBT. The non-residence of the nominees was another ground for disputing HBT's choice of nominees. HBT claimed that BMT was one of the trust corporations involved in a certain action (sic).

Held, allowing the plaintiffs' application:

(1) The court should examine whether HBT had acted properly (in good faith) in making their nominations and whether the nominees were fit and proper persons to hold office.

(2) The allegation of the plaintiffs that there might be collusion between HBT and their nominees was not substantiated by any direct evidence.

(3) The suddenness of HBT's decision to retire, coming shortly after the fourth defendant had met an officer of HBT's holding company in Hong Kong, HBT's failure both to take into account and to give sufficient consideration to the wishes of the majority of the beneficiaries, HBT's failure to give adequate consideration to the large proportion of beneficiaries who wanted to appoint BMT as the new trustees and the decision of HBT to appoint from the preferred class of beneficiaries, thereby disqualifying both BMT as a candidate and the second plaintiff as a preferential candidate, do not prove collusion.

(4) These facts are, however, capable of proving that HBT might not have acted with that degree of detachment and impartiality expected of trustees who had represented to all the beneficiaries that they would 'propose to the court persons who in [their] opinion will be suitable and capable in taking over the trust'.

(5) In deciding on the fitness of the nominees to be appointed, the court should refer to the capacity, circumstances or character of the nominee to see if he was well qualified for office, was a person of independent means, had a great deal of leisure and a considerable part of his time to spend at the place where the trust property was situated.

(6) Where the donee of a power comes to court for the approval of his nominee, the court has a power to refuse approval even where if the nominee had been appointed out of court, the court would not have objected. In other words, the court is entitled to apply a more stringent test when it is asked to sanction a nominee.

(7) In considering the propriety of the nominations and the fitness of the nominees to hold office as trustees, the starting point is the reasons given by HBT for nominating the second, fourth and fifth defendants and rejecting BMT and the second plaintiff.

(8) Maturity of mind and detachment in judgment and experience are desirable qualities but youthfulness is not necessarily associated with the lack oif such qualities. There was no doubt that HBT's nominees were knowledgeable about the affairs of the trust and were qualified in terms of their professional qualifications. But what is more important is the integrity of the trustees and their ability to be impartial between the beneficiaries.

(9) The plaintiffs' allegations of wrongdoing by HBT's nominees could not be taken into account as they had not been proved. The alleged wrongdoings were known to the victims for a long time. No court proceedings had been taken except in one suit which had not progressed further since it had been filed.

(10) The second, fourth and fifth defendants were guilty of a material non-disclosure in not disclosing to the court their temporary status as trustees of the charity settlement when they obtained a court order to vary the trusts of the charity settlement. This would have increased the income of the trust and thus also increased the trustees' income. The incident thus did not reflect well on their character. The submission that their counsel was responsible for this non-disclosure could not be accepted in the absence of an affidavit from that counsel accepting responsibility.

(11) Clause 23's reference to 'trustees for the time being in Singapore' have the natural meaning of trustees who are for the time being physically present in Singapore. It was also not a normal use of language to describe non-resident trustees as going out of and remaining out of Singapore (as was done in one of the clauses). The language was wholly apt to describe resident trustees.

(12) Examining the other clauses, the words import the notion of trustees residing in Singapore and not merely present from time to time. The words used were consistent with the settlor's inarticulated premise that all the trustees or at least two of them would be resident in Singapore.

(13) The trustees of the family settlement had a duty to undertake the trusts of the charity settlement and the relation settlement. The words of the clauses in the relation settlement and the charity settlement showed that the trustees had to be resident in Singapore. It was fantastic to impute to the settlor the stipulation that all that the trustees, where they are non-resident, have to do is to land in Singapore for a moment of time, make their decisions, give their instructions and then leave for home. Considering all these points, the second and fifth defendants were wrongly included as qualifying beneficiaries for nomination.

(14) As regards whether all the trustees had to be resident or whether it was sufficient that some of them were resident, although it was not necessary to decide the point, the first was favoured. The settlor had made his fortune in Singapore, invested in immovable property here, created his trusts subject to local law and appointed his three sons who were resident in Singapore as his first trustees. In addition, the trust deeds were drawn up by local solicitors who must have been aware of the general rule that trustees who are resident out of the jurisdiction should not be appointed trustees except in exceptional circumstances.

(15) Even if this construction were wrong, the authorities establish that it would not be right for the court to appoint trustees who are out of the jurisdiction except in exceptional circumstances.

(16) HBT's ground for its refusal to nominate BMT on the grounds that BMT was one of the trust corporations nominated in another action was presented without a scintilla of evidence. No allegations were disclosed in HBT's affidavit, but one of the counsel in court revealed that one of BMT's directors had misappropriated trust funds. BMT had, however, made good the loss and that director was no longer a director of the company. That incident could have occurred in any organization and as it occured more than ten years ago, it had no relevant bearing on the present professionalism of BMT.

(17) Another of HBT's grounds for rejecting BMT was based on a wrong premise. Although BMT would have to deal with the same problems as HBT, there was no evidence to show that BMT could not cope with the problems. Also, a great number of HBT's problems were generated by the dissatisfaction of the plaintiffs against HBT which were not faced by BMT.

(18) HBT's reason for rejecting the nomination of the second plaintiff on the ground that his nomination was submitted after HBT's deadline was perverse. Provided that the nominations did not come in after HBT had irrevocably made their decision, the delay did not affect HBT's ability to judge the nominations fairly.

(19) The court should refer the matter back to HBT to make fresh nominations, but since HBT had invited the court to choose the trustees, BMT would be appointed as such. HBT would be given leave to retire as trustees from that day. The necessary consequential orders and directions would now be dealt with and arguments as to cost would be heard.

[*Editorial Note*: The second to sixth defendants have appealed to the Court of Appeal vide Civil Appeal No 33/1989.]

Cases referred to

1 *Tempest* v *Lord Camoys* (1882) 21 Ch D 571 (distd)
2 *Re Hodson's Settlement* (1851) 9 Hare 118, 68 ER 439 (distd)
3 *Re Gadd* (1883) 23 Ch D 134 (distd)
4 *Thomas* v *Williams* (1883) 24 Ch D 558 (distd)
5 *Re Hall* (1886) 33 WR 508 (distd)
6 *Re Higginbottom* [1892] 3 Ch 132 (distd)
7 *Re Kensit* [1908] WN 235 (distd)
8 *Re Sales (1911)* 55 Sol Jo 838 (distd)
9 *Re Brockbank* [1948] Ch 206 (distd)
10 *Re Cotter* [1915] 1 Ch 307 (refd)
11 *Attorney-General* v *Clack* (1839) 1 Beav 467, 48 ER 1021 (refd)
12 *In re Earl of Stamford* [1896] 1 Ch 288 (refd)
13 *Re Norris* [1883] WN 65 (refd)
14 *Re Whitehouse* [1982] Qd R 196 (distd)
15 *Fox* v *Stirk* [1970] 3 All ER 7 (folld)
16 *Re Whitehead's Will Trusts* [1971] 2 All ER 1334 (folld)

Legislation referred to

Trustee Act (Cap 337, 1985 Ed) s 40(1)
Trustees Act 1925 [UK] s 36

Aloysius Leng and *Devadas Mathavan* for the plaintiff.
Koh Juay Kherng for the first defendant.
J Parker QC for the second to sixth defendants.
TPB Menon for the seventh to ninth defendants.

Cur Adv Vult

Chan Sek Keong J: The application in respect of which I now deliver judgment, ie summons-in-chambers no 443 of 1989, was made on 23 January 1989 by the first defendants, Hongkong Bank Trustee (Singapore) Ltd ('HBT'). It came on for hearing before me on 27 February 1989. The application seeks orders of court that (a) HBT be discharged as trustees of a settlement ('the family settlement') and (b) the second, fourth and fifth defendants be appointed as trustees in their place and (c) all necessary and consequential orders. The application is strongly objected to by the plaintiffs who, together with the seventh to ninth defendants, are in favour of a trust corporation, viz British Malayan Trustees Ltd ('BMT'), being appointed.

The application was made in the course of the proceedings in the main action, viz OS 878 of 1987, the hearing of which has been deferred until the determination of this application. The main action was originally commenced on 8 August 1987 by the plaintiffs against the first defendants for (a) the removal of the first defendants as trustees of the family settlement; (b) the appointment of BMT as trustees in their place; and (c) all necessary and consequential orders. On 29 September 1987, five other beneficiaries applied to be (and were) joined as the second to six defendants and also for an order that they be appointed as co-trustees with HBT. At that time HBT were defending the action for their removal. On 17 November 1987, three other beneficiaries also applied to be and were added as the seventh to ninth defendants.

HBT have no beneficial interest in the family settlement but all the plaintiffs and the other defendants are income beneficiaries thereof. On the evidence before the court, the plaintiffs and the seventh to ninth defendants, who are on the same side in opposition to HBT's nomination, represented about 62% of the income beneficiaries whilst the second to sixth defendants represented about 38% of the beneficiaries. Altogether there were 79 beneficiaries at the date of hearing of the application.

Background events

I must now go back in time to describe the events which have led to the action of HBT in pre-empting the plaintiffs' action for their removal by filing S/C 443 of 1989, for such is the effect thereof. Between 1921 and 1935, the settlor, viz Shaik Sallim bin Mohamed bin Sallim bin Talib, by three indentures, settled a great number of his immovable properties all of which were situated in Singapore, on various trusts for his descendants, relations and charity. The family settlement was made in 1921 and subsequently reconstituted in its final form by an indenture of 7 October 1933. The second settlement ('the relation settlement') was created by an indenture dated 6 October 1932. The third settlement ('the charity settlement') was created by an indenture dated 7 August 1935.

Under the family settlement, the net income of the settled property during the trust period (defined as the lifetime of the survivor of 37 named individuals plus 21 years less 10 days) is to be divided between the seettlor's issue for the time being per stirpes, with males taking twice the share of females, on protective trusts. At the end of the trust period, the corpus and income of the settled property is to be held in trust for the beneficiaries then living in the same shares as they enjoy immediately before such date.

The family settlement, the relation settlement and the charity settlement are closely linked. I need only mention two important links. Firstly, cl 13 of the family settlement, which provides that the trustees of the family settlement shall accept and undertake the trusts of the relation settlement, failing which their commission shall be forfeited, was later, by a supplemental indenture dated 31 August 1935, applied to the charity settlement. Secondly, upon the expiry of the trust periods of the three settlements, the corpus of each of the settlements will be held for the benefit of the beneficiaries of the family settlement then surviving and in the shares then held by them.

The first trustees of the three settlements were the sons of the settlor. At the beginning of 1980, the trustees of the three settlements were Abdullah bin Salim Mohammed bin Talib, Hussein Ahmed Salim bin Talib and Kamal bin Salim Talib. Abdullah died on 27 June 1980. Ali, the father of the second, fourth and fifth defendants, desired to be appointed as trustee in place of Abdullah. The surviving trustees, however, appointed one Mustafa bin Moshsin Talib as trustee whereupon Ali applied, unsuccessfully, to be appointed in place of Mustafa, in OS 340/80. Hussein, Kamal and Mustafa ('the defaulting trustees') were subsequently removed by the court in OS 1269 of 1985 and HBT were appointed as sole trustee in their place with effect from 28 August 1986 by a court order dated 5 September 1985. The plaintiffs in OS 1269/85 were the second, fourth and fifth defendants in these proceedings.

After their appointment as trustees of the family settlement, HBT on 19 March 1987 were called upon by the second and fouth defendants to take over the trusteeship of the relation settlement. HBT declined as a result of which the second, third and fourth defendants filed OS 675 of 1987 for (1) a declaration that HBT were trustees of the relation settlement by virtue of their appointment as trustees of the family settlement, (2) an order to remove them and (3) an order to appoint themselves as trustees. This application which is being opposed by the plaintiffs and the seventh to ninth defendants in these proceedings is also to be heard after the delivery of this judgment

In relation to the charity settlement, the second, fourth and fifth defendants filed OS 415 of 1987 on 7

April 1987 for orders: (1) to remove the defaulting trustees as trustees and (2) to have themselves appointed as trustees. At a short hearing before me on 18 May 1987 which was opposed by Hussein who proposed that HBT be appointed as trustees by reason of cl 13 of the family settlement, I made an order appointing the second, fourth and fifth defendants as trustees. My concern at that time was to ensure that the charity settlement should not be left unadministered as it appeared to have been since the removal of the defaulting trustees as trustees of the family settlement. Two days later, Hussein's solicitors requested a further hearing which I granted. Shortly after that, the second, fourth and fifth defendants on 16 July 1987 filed an ex parte application, OS 785/85, to vary the objects of the charity as well as their power of investment. The court made an order in terms of the application on 28 August 1987. At the further hearing of OS 415 of 1987 on 29 July 1987, I decided to vary my original order to allow the second, fourth and fifth defendants to continue to act as trustees until the hearing of OS 878 of 1987. I should mention one final set of court proceedings by way of background. In OS 1301/87, HBT applied to court to dispose of certain investments made in Australia by the defaulting trustees. They consisted of two immovable properties which have now been sold. Part of the proceeds has been collected and when the full proceeds are realized HBT will have a capital sum of about $17 million.

The current powers of investment of the trustees of the family settlement have been extended by two orders of court made on 9 May 1966 and 18 July 1966 so that they now include the power to invest in immovable properties and trustee securities (other than interest-bearing securities) in Singapore, Malaysia, the United Kingdom and Australia. The total value of the assets of the family settlement, consisting of immovable properties in Singapore, trustee securities in Singapore, Australia and the United Kingdom, and the proceeds of the Australian investments, is estimated to be in the region of $60 million.

Proposed retirement of HBT

The specific events leading to the filing of S/C 443 of 1989 are as follows. After the commencement by the plaintiffs on 8 August 1987 of proceedings to remove HBT as trustee, HBT entered appearance on 18 August 1987. They filed two affidavits, on 17 November 1987 and 21 January 1988. Then, on 17 June 1988, HBT sent a circular to the beneficiaries proposing to resign as trustees and to select trustees for appointment in their place. The relevant portion of the said circular read:

> 3 Resignation of Hongkong Bank Trustee (S) Ltd
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> It has become increasingly evident over the recent past that *a substantial proportion of the beneficiaries* of the Sallim Talib settlement *wish us to resign as trustees. In view of this we are unable to continue our trusteeship and therefore propose resigning in favour of new trustees.* (Emphasis added)
>
> *In line with the settlor's stated objectives we propose appointing three trustees* out of the class of beneficiaries and in order for us to make the appropriate selection we are writing to you to ascertain whether you or any other member of the beneficial class wishes to stand for the post of trustee. As you will appreciate we are obliged as trustees to ensure that the persons to whom we are transferring over duties and obligations as trustees will be in a proper position to administer the trust faithfully and in the best interest of all the beneficiaries. Therefore we would be grateful if you could write to us with full details as to why you consider yourself or the person you wish chosen, an appropriate choice so that we have full information upon which we can make our selection. Our decision will of course be final and not open to discussion. (Emphasis added)
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> In matters of this nature it is imperative that a true frame is imposed to ensure that a decision can be reached without undue delay. We will therefore only take into account responses to this letter received before 31 July 1988.

The plaintiffs responded to the circular on 26 June 1988 by filing a notice of motion for hearing on 15 July 1988 for an injunction to restrain HBT from appointing new trustees pending the hearing of the action for their removal. On 6 July 1988, the second and fourth defendants responded to HBT's circular of 17 June 1988 and offered themselves for selection. The fifth defendant responded likewise two days later. On 15 July 1988, the hearing of the notice of motion was adjourned to a date to be fixed.

On 27 July 1988, HBT sent another circular to the beneficiaries to clarify their circular of 17 June 1988. The relevant portion of this circular read:

> Through our said circular of 17 June we requested beneficiaries of the settlement to write to us and let us have their views. *In view of the reaction to this circular please be informed that Hongkong Bank Trustee (Singapore) Ltd will not be resigning without an application to court. What we will do after 31 July 1988 is to consider the representations received by us and to propose to the court persons who in our opinion will be suitable and capable in taking over the trust.* All court documents relating to our resignation will therefore be available to the beneficiaries as such. *The ultimate decision on the appointment of new trustees lies with the court. That is, if the court is of the view that any person or persons proposed by us are not suitable, the court may* then make any order which they deem fit under the circumstances of the case. (Emphasis added)

At the hearing of the plaintiffs' notice of motion before me on 28 July 1988, counsel for HBT stated that HBT would not appoint the new trustees but would put their proposal and the plaintiffs could put forward their own proposal for the court to decide. This, of course, was not what HBT had actually said in their first circular. On that basis, the plaintiffs withdrew the notice of motion. Thereafter, the plaintiffs took no step to propose their nominees to HBT until 21 December 1988 when HBT were informed in writing that 44 beneficiaries of the family settlement wished to appoint BMT as the new trustees and the second plaintiff as co-trustee. On 23

January 1989, HBT made known their selection of the new trustees by filing S/C No 443 of 1989.

Power to appoint trustees

Clause 19 of the family settlement provides for the power to appoint trustees in the following terms:

> The statutory power of appointing new trustees shall be vested in the settlor during his life and the settlor may also remove any trustee or trustees from office during his life and after his decease the said statutory power shall be vested in the persons authorized by Ordinance for the time being but no trustee may be removed from office by reason only of his absence from the Colony for more than one year if he shall have delegated to the resident trustees or one of them power to act in his place.

The statutory power is set out in s 40(1) of the Trustee Act which, when applied to HBT, reads:

> Where a trustee ... desires to be discharged from all or any of the trusts or powers reposed in or conferred on him ... then, subject to the restrictions imposed by this Act on the number of trustees –
>
> (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
> (b) if there is no such person, or no such person able and willing to act, then the ... trustee for the time being, ...
>
> may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so ... desiring to be discharged, ... as aforesaid.

HBT's position before the court is that they are willing and able to exercise their statutory power, but they seek the court's assistance to appoint their nominees in order 'to put an end to any litigation by disputing beneficiaries on the issue of the sole trustee's power to appoint'. Before me, counsel for HBT and their nominees have argued that the court must appoint the nominees unless the court is satisfied that the power has not been properly exercised. The case for the plaintiffs and the seventh to ninth defendants, who are on the same side, is that where the court is being asked to appoint trustees, the court has full discretion to appoint its own trustees and need not pay any regard to the wishes of HBT.

The law is succinctly stated in 48 *Halsbury's Laws of England* (4th ed) para 702:

> *Non-interference by the court*: The court does not interfere with the appointment of new trustees by the persons in whom the power of appointment is vested. After proceedings have been instituted in court for administering the trust, they can still exercise the power, unless by the order made in the administration proceedings the power is withdrawn from them and not merely suspended, but their nominee must be approved by the court.

Counsel for HBT has also referred me to a number of authorities which I will now consider.

In *Tempest* v *Lord Camoys*[1] at p 578, Jessel MR stated the principle as follows:

> It is very important that the law of the court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The court says that the power, if exercised at all, is to be properly exercised. This may be illustrated by the case of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trusts has been made they may still exercise the power, but the court will see that they do not appoint improper persons.

In *Re Hodson's Settlement*,[2] Turner VC applied this principle in refusing to prevent a trustee from exercising his statutory power even though he had previously attempted to exercise it corruptly by demanding payment.

In *Re Gadd*,[3] a decree of administration of the trusts of a will directed 'that some proper person be appointed' a trustee of the will in place of the deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was the defendant. The plaintiff took out a summons to have AB appointed trustee and the defendant a summons to have CD appointed. Bacon VC appointed AB but his decision was reversed by the Court of Appeal on the ground that if the defendant nominated a fit and proper person, the court must appoint the nominee. In the course of hearing argument, Jessel MR said (at page 136) that the judge had no discretionary power to say that another person was better than the nominee of the person who had the power of appointment. In his judgment, to which the other members of the court concurred, Jessel MR said:

> I am of opinion that the appointment cannot stand. If the plaintiff wishes to take objections to the fitness of the defendant's nominee the case will be referred back to the Vice-Chancellor to consider the objections. If they are allowed, then the defendant must nominate some other person, subject to the approval of the court.

Re Gadd[3] was followed in a series of cases in the court of first instance, viz *Thomas* v *Williams*,[4] where a beneficiary brought an action for, inter alia, appointment of a new trustee against the wishes of the donee of the power; *Re Hall*,[5] where the trustee-donee of the power had already appointed a co-trustee against whom there was no objection as to his fitness; the issue was whether he could be restrained from acting and this depended on whether the trustee's power was intact; *Re Higginbottom*,[6] where the court discharged the trustees it had earlier appointed after the donee of the power intervened to say she wished to exercise her power: the issue was argued as one of jurisdiction, no actual appointment having been made by the donee; *Re Kensit*,[7] where the court upheld the right of a continuing trustee to refuse to appoint the Public Trustee in his place against the wishes of the retiring

trustee; and *Re Sales*,[8] where the court decided in circumstances where the power of appointment had not been taken away from the donee, the donee had a preferential right to appoint new trustees. The final case cited is *Re Brockbank*,[9] where the court held that all the beneficiaries of a trust have no power to compel a trustee to appoint a new trustee against his wishes. In this regard, Vaisey J said that 'The court itself regards such a power as deserving the greatest respect.' In each of the aforesaid cases, where relevant, no dispute arose as regards the fitness of the trustees appointed or nominated by the donee of the power except in *Re Gadd*,[3] and there the objection was that the nominee lived in Sheffield whilst the trust property was situate in Halifax.

In the present case, HBT have not appointed new trustees in exercise of their statutory power. They have applied to the court to appoint as trustees the persons they have nominated. The plaintiffs have sought to impugn both the nomination and the nominees. The question before this court is whether or not it should approve the nomination and the nominees and the answer to that depends on (1) whether HBT have acted properly, ie in good faith in making the nominations, and (2) whether the nominees are fit and proper persons to hold office as trustees of the family settlement. That this is the correct approach is accepted by HBT and their nominees.

Some guidelines as to how the court should approach these two matters are found in *Re Gadd*[3] where the court referred to the capacity, circumstances or character of the nominee (to which there was no objection) and that he was well qualified for office, was a person of independent means, had a good deal of leisure and a considerable part of his time to spend at the place where the trust property was situated. The court found him fit and appointed him. There is also established authority that where the donee of a power comes to court for approval of his appointee or nominee (and here, I see no sensible distinction between a case where he cannot appoint without the sanction of the court and a case where his nomination is subject to the sanction of the court), the court has the power to refuse approval even where if the appointee or nominee had been appointed out of court, the court would not have objected. In other words, the court is entitled to apply a more stringent test when it is asked to sanction an appointee or nominee.

In *Re Cotter*,[10] a sole surviving trustee exercised his statutory power and appointed his solicitor in place of a deceased trustee after the court had made a partial administration order. Some beneficiaries objected to the appointment as being improper on the grounds that (1) the power could not be exercised without the approval of the court and (2) although the personal fitness of the new trustees was not questioned, a person in his position could not possibly be a fair and impartial trustee. Astbury J held that the rule that the donee of a power to appoint new trustees could not exercise it after the court had made an order for administration without the approval of the court applied only when there was a general administration order. It did not apply to an order for partial administration under Order 55, unless an inquiry had been ordered as to the appointment of new trustees, or the proceedings had been taken for the purpose of having new trustees appointed. His Lordship held further that though the court would not itself have appointed a solicitor of one of the parties as a new trustee, such an appointment by the donee of the power was not on that ground invalid. He made it clear that if the trustee had come to court for his sanction, he would not have given it. His Lordship (at p 316) said:

> This appointment is one which I think the surviving trustee, having regard to what had taken place between himself and the plaintiff in the past, ought not to have made. But that is a matter of opinion. It is not a matter of law, and having regard to the authorities by which I am bound, I do not think I have any power to upset the appointment, and the action must therefore be dismissed.

In *Re Cotter*,[10] Astbury J referred to and distinguished the decision of *Attorney-General* v *Clack*[11] where the specific object of the proceedings was the appointment of certain trustees to a charity and the Master of the Rolls held that pending those proceedings the donees of the power ought not to have exercised it. His Lordship also referred to the case of *In re Earl of Stamford*[12] where the tenant for life, who was the donee of the power, appointed her own solicitor to be a new trustee. There, Stirling J said (at pp 297-300):

> I now come to what has throughout seemed to me the matter deserving the most serious consideration, ie the fact that the countess has chosen to appoint her own solicitor as trustee of this will. The trustees of the will are vested with a power of sale over the real estates; they will also be trustees for the purpose of the Settled Land Acts; and it is truly pointed out, that in certain cases the trustees in exercise of the powers conferred by those Acts may have to consider matters in which the interests of the tenant for life and remaindermen may conflict, and in which they will be bound to hold an even hand between all parties. And it is said that Sir Thomas Wright, the new trustee, who has to advise the countess in the capacity of tenant for life, will be unable to discharge that duty efficiently when he comes to deal with the same matters as to which he has advised the countess, in his capacity as trustee. I feel greatly the force of that objection. It is one which prevents the court, when it is called upon to appoint a new trustee, from appointing a gentleman in such a position as Sir Thomas Wright now occupies. It also prevents the court from sanctioning such an appointment.
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> *But this is not a case in which the sanction of the court is asked in any way and, as is pointed out by Cotton LJ himself in In re Kemp's Settled Estates the question whether an appointment of this kind, when already made by the donee of the power, is or is not valid, is a very different one from the question whether the court itself would see fit in the first instance either to make it or sanction it.* In *In re Kemp's Settled Estates* the case of *Forster* v

Abraham was referred to. In that case it was held by Sir G Jessel MR that there was nothing to prevent the tenant for life being appointed trustee of a settlement, although the court would not itself readily sanction such appointment. And Cotton LJ, when that case was cited in *In re Kemp's Settled Estates*, makes this observation: 'That case only decides that the appointment of a tenant for life under a power was not invalid, it does not decide that the court would have appointed him.'

... .

The question, then, which I have to ask myself is, does the existence of this rule of practice, however binding it may be, prevent the donee of a power from appointing her own solicitor to be a trustee? And in my judgment, although I should not have made the appointment or sanctioned it, it does not preclude the tenant for life from so doing. As far as the individual selected is concerned, there can be no question that he is a person who is excellently fitted to be trustee. He has had large experience, he is acquainted with the estates, and I have got this, which weighs very much with me, that although all the beneficiaries now in existence are before the court, not one of them has said a word in opposition to the appointment. They appear before me and say they desire to occupy a neutral position – that they would have been perfectly content if Mr Payne had continued to be trustee, but that they are equally satisfied with Sir Thomas Wright, and they take no part in any way, but leave the whole matter in the hands of the court. Now, under those circumstances, I do not think that I can say that this appointment is otherwise than valid.

In *Re Norris*[13] a decision which was referred in the judgment of Stirling J, on the retirement of one of two trustees, the continuing trustee, who was the solicitor to the trustees, had appointed his son, who was partner with him in his business, as a co-trustee of a will, the trusts of which were being administered by the court. The trustees took out a summons asking that the appointment of the new trustee be approved by the court. It was conceded by the opposing beneficiary that after *Re Gadd*,[3] the power to appoint remained with the continuing trustee. It was also not disputed by the parties that the appointment was subject to the sanction of the court. Pearson J, in refusing to sanction the appointment, said:

It is admitted that, according to the ordinary practice, the court would not appoint as trustee the solicitor of the existing trustee, and I think that the court would certainly not appoint as a co-trustee with that solicitor his partner, whether he was his son or some other person. The court does not look at the competency of the particular person; it looks at the position which he fills, and, according to the ordinary rule of the court, the solicitor of a trustee is not a person who should be appointed a trustee. I think it is of the greatest importance that the court should adhere to the general rule, and for this, if for no other reason, that it prevents the necessity of considering in any particular case whether the solicitor is or is not a person of respectability and trustworthy. The court always declines to go into any question of that kind, and says, assuming that you are the very person who would be most fit to be a trustee, we object to you simply on the ground of the position which you hold. Then Mr Everitt says that in this case the trustees are appointed for the purpose of the sale of this property, they are going to conduct the sale under the order of the court, or, at any rate, the conduct of the sale will to a great extent be subject to the sanction of the court and carried on with the knowledge of all the parties, and there is no reason therefore in this particular case, whatever may be the general rule, why these two solicitors should not be the trustees. I differ from Mr Everitt there; I think that, whether the sale is to be conducted under the direction of the court or outside the court, the cestuis que trust are entitled to the assistance of two independent persons as trustees to aid them in conducting the sale in the best manner. They have a right to ask that they shall have the aid of two minds, and not, as they would have in this case, where the father and son are in partnership, the aid practically of one mind only. It is plain that, the father and son being in partnership, there would be practically only one person acting as trustee and not two.

For these reasons I am of opinion that I cannot sanction this appointment, and I must refer the matter to chambers that a new trustee may be appointed. Mr JJ Allen will still have power, as he had before, to nominate a fit and proper person, but that person cannot, for the reasons which I have given, be his partner.

I am very far from saying, and I must not be understood to say, that, if there was a trust which was not being administered by the court, and the person who had the power of appointing new trustees had bona fide appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the court would be invalid. If such a case came before me, and I found that the appointment had been made bona fide outside the court, I should certainly hold that the trustees were validly appointed.

Finally, I should refer to the decision of *Re Whitehouse*[14] where the beneficiaries of two trusts applied to court for the removal of the existing trustees CW and MW and for the appointment of another or other trustees. Immediately prior to the hearing of the application, CW appointed O as trustee in lieu of MW who was incapable of acting, due to her mental state. The beneficiaries then applied to remove O as well. His Honour, Macrossan J, after referring to *Attorney-General* v *Clack*[11] and *Re Cotter*,[10] said (at p 205):

The pending proceedings in the case before me raise particular considerations in that they actually seek the appointment of new trustees and the removal of existing ones, but I am not prepared to hold that, prior to any order being made by the court in the pending proceedings, the power of appointment of an existing trustee is nullified. In the circumstances in which the power of appointment was exercised in the present case I do, however, consider the appointment to be an extremely impetuous act. A more reasonable way of proceeding would have been for the existing trustee, CM Whitehouse, in the context of the pending applications, to put before the court an intimation of his desire to appoint a particular new trustee but to withhold from actually making an appointment. I do not think that his having actually rushed in to make the appointment, should, in the circumstances of the case, give him an advantage over what his position would have been if he had adopted that more reasonable course and I do not consider that it should give

his appointee, Orr, any additional claim to retain his appointment beyond any claim he would have had to fill that office if the more reasonable course had been adopted.

In *In re Gadd, Eastwood* v *Clack* (1883) 23 Ch D 134, Baggallay LJ cited with apparent approval the observations of the Master of the Rolls in *Tempest* v *Lord Camoys* (1882) 21 Ch D 578 that, in the case of persons having a power of appointing new trustees, even after a decree in a suit for administering the trusts has been made, they may still exercise the power, but the court will see that they do not appoint improper persons.

In terms of modern practice, I am not inclined to hold that an onus has actually been thrust upon CM Whitehouse and Orr of justifying the appointment of the latter, but I think it preferable to say that, in the circumstances of the case as I exercise my power of review under s 8 of the Trusts Act, I shall examine the suitability of the appointment in the strictest way.

In regard to the appointment of Orr, his Honour said (at p 207):

While I have a certain sympathy for the position of Mr Orr and while his competence, generally and professionally, is beyond question, I think he has regarded himself as obliged to side with the existing trustee and support him or at least he has permitted himself to do this. He has failed to show the degree of detachment and that impartiality between existing trustee and beneficiaries which one would prefer, just as, prior to the hearing, he failed to correct the deficiencies which existed in the administration of the trust and in the keeping of the accounts relating to them. I reach this conclusion even though his opportunity for independent action has to date been somewhat limited. His professional connection with the existing trustee, whom I propose to remove and, as well, the circumstances of his appointment described above, add to the grounds of my decision that it would be better for the future to set aside his appointment and make a fresh start.

In *Re Whitehouse*,[14] the court was exercising a power of statutory review which is not available to this court. Here, the court is exercising its equitable jurisdiction in sanctioning or refusing to sanction a nomination by a trustee for appointment by the court.

I return now to consider the nature of S/C No 443 of 1989. It is clearly in form and intent an application for sanction by the court for the appointment of HBT's nominees as trustees. The intention of HBT is to obtain the sanction of the court so that, in their own words 'the appointment of new trustees is one that has been scrutinized and considered by the court after hearing all the parties rather than one made by the first defendants pursuant to the trust deed.' It is also a case where proceedings have been taken to remove the existing trustees and to appoint new trustees in their place. I now turn to the propriety of the nominations and the fitness of the nominees to hold office as trustees.

Propriety of nominations and fitness of nominees

The starting point is the reasons given by HBT for nominating the second, fourth and fifth defendants and rejecting BMT and the second plaintiff. They are set out in the affidavit of Foo Ko Hing dated 23 January 1989, the relevant paragraphs of which read:

9 I verily believe that if the first defendants were to remain as trustees of the settlement, the aforesaid enquiries, allegations and litigation would continue to proliferate. *Thus remaining as trustees of the settlement would bring about detriment to the settlement as well as the trust corporation.* Further, some of the beneficiaries are clearly of the view that they are in a better position than the first defendants to administer the settlement. (Emphasis added)

14 I verily believe that the positions taken by the beneficiaries are as follows:

(1) Although the circular dated 17 June 1988 inviting nominations for new trustees provided for nominations to be submitted by 31 July 1988, there was no response from any of the first to seventh plaintiffs until a letter dated 21 December 1988 from the firm of Abraham Low & Partners on behalf of the second plaintiff. 44 beneficiaries claim that they represent some 32% share of settlement income and wanted the first defendants to be replaced by the second plaintiff Abdul Jalil bin Ahmad bin Talib and the British and Malayan Trustees Ltd (BMT) as co-trustees of the settlement. A copy of the said letter and the list of supporting beneficiaries is annexed hereto and marked 'FKH7'.
(2) The second to sixth defendants are supported by beneficiaries whose aggregate share of the settlement's income is 37.328%. They would prefer any of the second to fifth defendants to take the place of the first defendants as trustees.
(3) The seventh to ninth defendants would prefer the first defendants to be replaced by another trust corporation as trustees. The trustee of their choice is BMT.

15 The positions taken by the three groups of beneficiaries are irreconcilable. Each group insist on nomination of their choice trustee or trustees to the exclusion of all others. Two of these groups of beneficiaries have each the support of beneficiaries whose share of the income from the settlement amount to more than 30% of the total income.

16 The relevant provisions on appointment of new trustees are cll 19 and 20 of the indenture ... Clause 19 provides that the statutory power of appointing new trustees shall be vested in the settlor during his life time and in the persons authorized by ordinance for the time being. In this instance, s 40 of the Trustee Act (Cap 332) is relevant.

17 Clause 20 provides that: 'New trustees unless appointed by the settlor shall be selected *as far as possible* from the sons and male issue of sons of the settlor in the male line and any child of the settlor or grandchild shall be selected in preference to remoter issue. If there shall be no such son or male issue capable or in the opinion of the appointers suitable, new trustees shall be selected from other male issue of sons of the settlor or from male issue of any daughter of the settlor who survives him.' (Emphasis added)

18 [Reproduces cll 23 and 26]

I am advised and verily believe that two implications of the said two clauses are that:

(1) there must be at least one resident trustee to protect the settlement property; and
(2) there must be at least two resident trustees to execute trust powers.

19 Having carefully considered and reviewed the nominations by all the beneficiaries, the first defendants decided that the most suitable candidates for the position of trustees are:

(1) Murtadha bin Ali bin Salim bin Talib ('Murtadha');
(2) Helmi bin Ali bin Salim bin Talib ('Helmi'); and
(3) Ameen bin Ali bin Salim bin Talib ('Ameen').

The proposed persons are the second, fourth and fifth defendants herein. As a summary, the said candidates are the most knowledgeable and qualified persons, who represent nominators forming 37.328% of the share of the settlement's income and *they are all male issue of the settlor's son* Ali bin Salim bin Talib.

(1) Murtadha, although not a Singaporean, has been in Singapore regularly over the last few years on account of the settlement, has stated (at p 8 of his curriculum vitae) that he will spend as much time in Singapore as shall prove to be necessary for the due and proper administration of the settlement, if appointed as trustee.
(2) Helmi is a Singaporean and has categorically stated that if he is appointed as trustee, he will give up his job with Messrs Arthur Young (Singapore) for the sole purpose of administering the settlement.
(3) Ameen has also stated (p 16 of his curiculum vitae) that if appointed as trustee he will give up his job with Messrs Peat Marwick Mclintok and spend such time in Singapore as is required in order to devote such time as required for the administration of the family settlement.

A copy of each candidate's curriculum vitae and covering letter are annexed hereto ...

20 On the other hand the first defendants take the view that both the second plaintiff and BMT are unsuitable as trustees for the settlement. Clause 20 of the indenture ... provides that new trustees shall be selected as far as possible from the sons and the male issue of sons of the settlor in the male line. It is only if there are no sons or male issue capable or in the opinion of the appointers suitable that new trustees shall be selected from other male issue of sons of the settlor or from male issue of any daughter of the settlor. *Abdul Jalil bin Ahmad bin Talib is a son of Fatimah binte Salim bin Talib a daughter of the settlor.* As there are male issues *who are willing and capable* in taking over as trustees, cl 20 of the indenture would have to be adhered to, unless otherwise ordered by the court. *Further, the nominations supporting the second plaintiff were submitted after the period of nomination, which had ended on 31 July 1988.* (Emphasis added)

21 As for BMT, I verily believe that *they will face the same problems as the first defendants have encountered since their appointment as trustees.* BMT can at best be in no better position than the first defendants. As many of the beneficiaries communicate only in Arabic and live in a remote part of the Middle East, communication remains a chief difficulty. It should also be noted that BMT was among other trust corporations nominated for appointment in OS No 1269 of 1985. (Emphasis added)

22 Although, the first defendants as the appointers of new trustees are empowered and entitled to appoint in good faith, I verily believe that any appointment will be resisted by the other two groups of beneficiaries. The first defendants are applying by this summons for the appointment of the recommended beneficiaries to act as trustees, so as to put an end to any litigation by disputing beneficiaries on the issue of the sole trustees' power to appoint.

I now summarize the objections raised by the plaintiffs fourth and fifth defendants are: (1) they belong to the preferred class of beneficiaries for appointment as provided by cl 20 of the indenture of settlement; (2) they represent about 38% of the shares thereof; (3) the second/fifth defendants, both non-residents, are prepared to spend as much time as necessary to look after the affairs of the family settlement, the fifth defendant being willing to give up his job in London for this purpose; the fourth defendant, a resident of Singapore, is also prepared to give up his job to administer the trust; (4) they are the most knowledgeable and qualified persons.

Plaintiffs' objections to nomination and nominees

I now summarize the objections raised by the plaintiffs and the seventh, eighth and ninth defendants. They are as follows:

(a) HBT are very close to their nominees and might have colluded with them in making the nominations; also, HBT could have been influenced by the fact that they themselves were nominated by the second, fourth and fifth defendants for appointment as trustees in Suit No 1269 of 1985.
(b) HBT exercised their discretion wrongly by insisting on nominating trustees under cl 20 when there was no duty to do so.
(c) HBT did not consider the nomination of the plaintiffs who had the support of majority of the beneficiaries, properly or adequately.
(d) HBT's nominees are not fit and proper persons as (i) they are too young, being 34, 28 and 24 years old respectively; (ii) they have no experience in administration of trusts or in investment of trust monies; and (iii) the integrity of the second defendant, who, being the eldest brother of the other two nominees, may be regarded as their leader, is suspect; (iv) the second and fifth defendants are not residents in Singapore; (v) the majority of the beneficiaries do not trust HBT's nominees and appointing them would lead to endless disputes amongst the beneficiaries, thus impeding the administration of the trust, to the detriment of the beneficiaries as a whole; (vi) they have a conflict of interest as they are making a very substantial claim (about $700,000) for costs arising out of OS 1269 of 1985 to be paid by the family settlement; (vii) HBT's nominees, being tenants for life, should not be appointed as trustees.

I propose to consider first the objections against the nominees.

Age and experience

As regards objections (d)(i) and (ii), maturity of mind and detachment in judgment and experience are obvious-

ly desirable qualities in a trustee but youthfulness is not necessarily associated with a lack of such qualities. The real question is whether HBT's nominees aare fit and proper to be given trusteeship of a settlement with assets of over $60 million where a balance has to be held between the interests of the income beneficiaries and those of the corpus beneficiaries. There is no doubt that HBT's nominees are, on the evidence, knowledgeable about the affairs and problems of the trust and are qualified in terms of their professional qualifications. But this answers only part of the question. What is more important is the integrity of the trustees and their ability to be impartial and hold an even hand between the interests of the beneficiaries. Here, I note that HBT's reasons for selecting the second, fourth and fifth defendants are based mainly on their preferred status, their qualifications and working experience (both the fourth and fifth defendants are chartered accountants but the qualifications and working experience of the second defendant are rather vague whilst the fifth defendant has worked since 1986) and their knowledgeability of the affairs of the family settlement. HBT did not appear to have asked for character references and appeared not to have been given them until after HBT had made their choice. I should add that the fact that HBT's nominees were the plaintiffs in OS 1269 of 1985 is a plus factor. Nevertheless, there is evidence that HBT have not looked beyond these considerations when they selected the nominees.

Wishes of majority of beneficiaries

Here, the evidence is clear that HBT did not either take into account or give sufficient consideration to the wishes of the majority of the beneficiaries. In Foo's affidavit, he treated the beneficiaries as falling into three camps and thereby gave the impression, intentionally or unintentionally, that their nominees had the support of the beneficiaries with the largest shares in the family settlement. Clearly, on the evidence, the plaintiffs together with the seventh to ninth defendants have the support of the majority of the beneficiaries in terms of number and shares. Since HBT decided to retire because a substantial proportion of the beneficiaries did not want them to continue in office, it is a little surprising that they should have selected nominees whom the same or greater proportion of beneficiaries also do not want as trustees. Moreover, the evidence shows that these beneficiaries did not distrust HBT but they do distrust their nominees. No reason has been given by HBT for this apparent inconsistency. Objection (d)(vi) has no merit whatever since the claim for costs is shortly to be adjudicated by the court. Objection (d)(vii) is also without merit as cl 20 of the family settlement allows beneficiaries to be appointed and further there is no rule against the appointment of tenants for life: see *Lewin on Trusts* (16th Ed) at p 423.

As regards objection (d)(iii), the plaintiffs rely on four events as evidence going to the integrity of the second defendant. The first concerns the manner in which the second defendant and his three brothers became 'directors' of an Egyptian partnership, viz Al Talib Al-Akaria, in 1984. It was suggested that they relied on a fraudulent document, ie a document in Arabic stating that the previous director and manager, viz Awad bin Salim bin Talib, had resigned when to the knowledge of the then manager Abdullah, Awad had been dead for six years already. The second event concerns the alleged disappearance of the beneficial interest of one Abdulgadir bin Amin bin Amad bin Talib in a half share in the Egyptian company. The third event concerns a claim in Suit No 5319 of 1983 by Fatimah binte Salim bin Mohd Talib in respect of her share in the estate of Abdullah and in which the second defendant is sued as the third defendant on the ground that he was a constructive trustee or a trustee de son tort.

I cannot take into account these three events as up to now no wrongdoing has been proved against the second defendant. The alleged wrongdoings were known to the victims for a long time but no court proceedings have been taken except in Suit No 5319 of 1983, which has not progressed any further since it was filed. The fourth event concerns the failure of the second, fourth and fifth defendants in failing to disclose to the court their temporary status as trustees of the charity settlement when they obtained a court order in OS 785/85 to vary the trusts of the charity settlement and to extend the powers of investment of the trustees to allow them to invest the proceeds of the sale of the properties of the charity (estimated at about $200,000) in such investments as the trustees think fit. It is contended thast this was a material non-disclosure which reflects on the integrity of HBT's nominees. Counsel for the nominees have submitted that the application in OS 785/87 was filed before the date of the variation order, that the non-disclosure was immaterial and that they were represented and advised by counsel throughout. The submission implies that counsel was responsible for the non-disclosure. As no affidavit has been filed by the said counsel accepting responsibility for this non-disclosure, I am unable to accept this submission.

In my view, the non-disclosure was material because if there had been disclosure, the court might have rejected the application or adjourned it pending the determination of the issues in the present action. But I find that this is not the only negative aspect of this matter. In the absence of any explanation from the second, fourth and fifth defendants as to why the application was made ex parte by a fresh originating summons rather than as an ancillary application under the still pending OS 415/87, in which the further hearing was known to their counsel, a reasonable inference would be that it was so done to

conceal it from Hussein, the defendant in OS 415/87, who was bound to object to it. The object and reasons of the application have some significance: it was to vary the trusts to benefit more charitable objects as well as to give unlimited powers of investment to the trustees; the reason for the first object was laudable but the reason for the second was to increase the income of the trusts so that at the same time, the trustees commission would also be increased.

In my view, the manner in which the application was made and the order of court obtained do not reflect well on the conduct of the second, fourth and fifth defendants and therefore their character. The application was not only made in some haste but the order was obtained without full disclosure of their temporary status. It has been submitted that this application was made in the interest of the charity. It was done with mixed motives. In the light of this episode, I am left with a lurking apprehension as to what their investment policy and strategy would be in regard to the trust fund of $70 million.

Non-residence of nominees

I come now to the issue of residence. The plaintiffs have advanced two arguments. The first is that the terms of the family settlement require that the trustees thereof must be resident in Singapore (ie in the ordinary sense of dwelling permanently or for a considerable time or having his settled or usual abode in Singapore: see *Fox* v *Stirk*[15] at p 11, per Lord Denning MR) and that there must be two of them present in Singapore before the trust powers and discretions of the family settlement can be executed and exercised. As the second and fifth defendants are not in Singapore on any professional passes or work permits, it is not disputed that they are not, in this sense, resident in Singapore even though they may spend a considerable amount of time in Singapore. The second argument is that, in any case, the court should not appoint or approve nominees who are resident outside the jurisdiction. HBT and their nominees contend otherwise on both points.

The first point raises a question of construction of the relevant provisions of the family settlement. They are as follows:

> 23 *If any trustee or trustees be absent from Singapore and there shall be at least two trustees in Singapore the trustees for the time being in Singapore (hereinafter called 'the resident trustees') may without consulting the absent trustee or trustees execute and exercise all or any of the trust powers and discretions vested in the trustees by these presents or by ordinance* and in particular may operate any banking account of the trustees in the same manner as if such *absent trustee* or trustees had ceased to be trustee or trustees and the receipt of the resident trustees shall be a sufficient discharge for all moneys whether on account of income or capital payable to the trustees and in favour of any person dealing with the trustees a statutory declaration by the resident trustees that the other trustee or trustees is or are absent from Singapore shall be conclusive evidence in favour of such person. (Emphasis added)
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> 24 *It shall be the duty of any trustee who has gone or is about to go and remain out of Singapore (hereinafter referred to as an 'absent trustee') to delegate by power of attorney* under his hand and seal to the resident trustees whether jointly or severally power to execute in his name and on his behalf any such conveyance, assignment, surrender, lease, discharge, receipt or other instrument relating to the settled property and the income thereof and accumulations of income including any property purchased out of such accumulations, as the trustees are authorized by these presents to make and execute and for and in the name of the absent trustee jointly with the resident trustees *to commence and carry on legal proceedings in relation to the settled property or the trusts of these presents and to defend answer or oppose any legal proceedings against the trustees and generally to delegate to the resident trustees power to use the name of the absent trustee and in his name and in the name of the resident trustees to execute and exercise all the powers and discretions vested in the trustees* by these presents and if any trustee remaining out of Singapore for more than one year does not give a power of attorney as aforesaid to the resident trustees he shall not be entitled to any share of the trustees commission during his absence from Singapore. (Emphasis added)
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> 25 *The trustees or the majority of them or the resident trustees may appoint two or more reliable persons* or a trust company or other incorporated company as agents to collect the income and manage the trust property and may delegate to such persons or company powers to sue and distrain and to grant and accept surrenders of leases and tenancies and to exercise all or any of the trust powers and discretions vested in the trustees by these presents and any such appointment shall be made by power of attorney or document in writing signed by the trustees or by the resident trustees and the attorney or attorneys of the absent trustees or by the resident trustees alone, provided always that the remuneration of such persons or company shall be paid by the trustees out of their commission. (Emphasis added)
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> 26 *If there shall not be two trustees resident in Singapore a single resident trustee shall have power to act only for the protection of the settled property and in such* a case the trustees shall forthwith appoint reliable persons or a company under the powers reserved to them under the last preceding clause as agents to collect the income and manage the settled property and in default application may be made to the court by any trustee or beneficiary for the appointment of a receiver or manager until there be two trustees in Singapore or until the trustees appoint agents or an agent under the last preceding clause. (Emphasis added)

The ordinary and natural meaning of the expression 'the trustees for the time being in Singapore' (or the definition 'resident trustees') in cl 23 is trustees who are for the time being physically present in Singapore. That is its plain meaning. However, since trustees who are for the time being in Singapore may be resident or not resident in Singapore in its ordinary sense, the said expression is capable of referring to three different combinations of trustees who are for the time being in Singapore: (A) trustees who are all resident; (B) some trustees who are resident and some not resident in Singapore; and (C)

trustees who are all not resident in Singapore. Both counsel for HBT and their nominees contend that the settlor had in mind case (C), whereas the plaintiffs contend that the settlor had in mind case (A) or (B) but not (C), and if (B) at least two trustees must be resident and for the time being in Singapore (ie B1). HBT's nominees fall within the category of (B1) as the second and fifth defendants are not resident in Singapore.

The arguments of counsel for HBT and their nominees place particular emphasis on the plain meaning of the words 'trustees for the time being in Singapore (hereinafter called 'the resident trustees')' in cl 23. They disregard the meaning of the immediately preceding words 'and if there shall be at least two trustees in Singapore' and ignore their effect on the succeeding words. The meaning of the first expression is clear when construed in isolation but, as I have shown, it is ambiguous in the context in which it appears. In my view, there are other indications in the other clause which suggest that the settlor had in mind case (A) or (B1) but not (C). Firstly, the expressions (i) 'absent from Singapore', in direct and immediate contrast to the words following 'and there shall be at least two trustees in Singapore' and 'absent trustee' in cl 23 and (ii) 'has gone or is about to go out of Singapore' (defined as 'absent trustee'), and 'remaining out of Singapore' in cl 24, import, more rather than less, the notion of trustees residing in Singapore and not merely present in Singapore from time to time. As counsel for the plaintiffs has submitted, it is not normal usage of language to describe non-resident trustees as going out and remaining out of Singapore; that language is only apt to describe resident trustees.

Secondly, cl 26 provides for a situation where there is one resident trustee. In that case, 'if there shall not be two trustees *resident* in Singapore a resident trustee shall have power to act only for the protection of the settled property.' In deliberately using the expression 'resident in Singapore', the settlor must have in mind ordinary residence in Singapore. If the term 'resident trustees' in cl 23 means non-resident trustees who are for the time being in Singapore, then this qualification in cl 26 would serve no purpose. All that cl 26 needs say is that 'A single resident trustee shall have ...' By using the opening words in cl 26, the settlor had at the back of his mind the fact or the necessity of at least two if not all of the trustees being resident in Singapore. Clause 26 then goes on to provide that the trustees must appoint agents to collect the income and manage the settled property, failing which a beneficiary may apply to court 'for the appointment of a receiver or manager until there be *two trustees in Singapore*'. Again, the use of the words '*two trustees in Singapore*' in this context is significant. If, by cl 23, the resident trustees (in the sense argued for by HBT and their nominees) are entitled to execute the trusts etc, then one would have expected the settlor to have used the expression 'resident trustees' here instead of 'trustees in Singapore'. The more probable explanation is that the latter expression is intended to refer back to the trustees 'resident in Singapore' in the opening words of cl 26.

Thirdly, the same argument is applicable to the expression 'if there shall be at least two trustees in Singapore' which also appear in the opening words of cl 23. If this expression were intended to mean only physical presence in Singapore and not also imply the notion of ordinary residence, then it would have been simpler for the settlor to have provided in cl 23 as follows: 'If any trustee or trustees be absent from Singapore, any two trustees for the time being in Singapore (hereinafter called the 'resident trustees') ...'. On the construction advanced by HBT and their nominees, the words 'if there shall be at least two trustees in Singapore' would be otiose. In construing a deed, all words therein should, if possible, be given some meaning or effect. In my view, in the context of cl 23, these words were used because it was consistent with the settlor's inarticulated premise (ie something which he took for granted) that all the trustees or at least two of them would be resident in Singapore. This intention is wholly consistent with the use of the words 'for the time being in Singapore'.

There are two further indications which support the above construction. It should be recalled that by cl 13 of the family settlement, the trustees have a duty to undertake the trusts of the relation settlement and of the charity settlement. This specific intention of the settlor can only be realized if the trustees of the family settlement are able to carry out and perform their obligations under the relation settlement and the charity settlement. It is therefore useful to examine the provisions of these two settlements relating to the powers of trustees thereunder. The first indication is found in the terms of the relation settlement. The proviso to cl 15 of the indenture of relation settlement dated 6 October 1932 reads:

> Provided always that *if any trustee or trustees be absent from Singapore* the power and discretion vested in the trustees by this clause shall be exercised by *the trustees resident in Singapore provided that there are at least two of them but if there are not two resident trustees in Singapore* such power and discretion shall be exercised by all the trustees and shall not be delegated to any attorney or attorneys. (Emphasis added).

The requirement in the proviso is sufficiently clear: there must be at least two trustees *resident* in Singapore. If there are two such trustees in Singapore, they may exercise the power and discretion vested in the trustees by cl 15; it is only when there are not two resident trustees in Singapore that all the trustees may exercise such power and discretion. Clauses 29, 30, 31 and 32 of the relation settlement (including the definition 'resident trustees') correspond substantially to cll 23, 24, 25 and 26 of the family settlement except that cl 29 contains a further

reference to the exercise by the resident trustees of the power and discretion under cl 15 thereof. It follows that if the trustees of the family settlement or at least two of them are not resident in Singapore, the power and discretion vested in trustees by the terms of the relation settlement cannot be executed or exercised.

The second indication is to be found in cl 9 of the terms of the charity settlement. It reads:

> There shall always be at least three trustees and any vacancy in the trusteeship shall be filled up as soon as conveniently may be and and a single trustee if there shall be only one trustee and the executors or administrators of the last surviving trustee shall only have power to appoint new trustees and to carry on all necessary business of the trust until new trustees are appointed *provided always that if any one of the trustees be absent from Singapore the remaining two trustees for the time being resident in Singapore (hereinafter referred to as the resident trustees)* may have and exercise without the concurrence of the trustee absent from Singapore all or any of the powers and discretions vested in the trustees in respect of the trust property and may receive and give effectual receipts and discharges for all moneys payable to the trustees. (Emphasis added)

The proviso to cl 9 uses language which is even plainer and clearer than that in the proviso to cl 15 of the indenture of relation settlement. The trustees contemplated by the settlor to be trustees of the charity settlement must be trustees resident in Singapore. The words 'being resident in Singapore' can only have that meaning. Even if the expression 'absent from Singapore' were apt, in that context, to refer to a non-resident trustee who has left the jurisdiction, the remaining two trustees must still be *resident for the time being in* Singapore. It must follow that if two of the resident trustees of the family settlement are not resident in Singapore, the charitable trusts cannot be administered.

In my view, the construction advanced by HBT and their nominees suffers from one fundamental weakness. It imputes to the settlor the notion that what he has stipulated is that when it is necessary to execute the trust powers and discretions all that the trustees, where they are non-resident, have to do is to land in Singapore for a moment of time, make their decisions, give their instructions and then leave for home. If I were to place myself in the armchair of the settlor, and taking into account his background and the conditions of the times, I would find that a fantastic notion.

For the reasons given above, I am of the view that the settlor had in mind case (A) or (B1) in cl 23 of the indenture of the family settlement. As HBT's nominees do not fall within category (A) or (B1), it is not necessary for me to decide whether the settlor intended case (A) or (B1). If it were necessary to do so, I would prefer case (A) for the following reasons: the settlor lived in Singapore, made his fortune in Singapore, invested his money in immovable properties in Singapore, created his three settlements in Singapore subject to Singapore law and appointed as the first trustees his three sons who were all resident in Singapore. Also, all the indentures of the said settlements and the supplemental indentures thereto were drawn up by Singapore solicitors who must have been aware of the general rule that trustees who are resident out of the jurisdiction should not be appointed trustees in the absence of any exceptional circumstances. In view of this principle, if the settlor had intended that the trustees might reside out of the jurisdiction, he would have provided expressly to that effect.

If I am wrong in this construction, there is a related objection that even if the terms of the family settlement permit the appointment of non-resident trustees, the court should not approve the appointment of trustees who are non-resident. A number of authorities have been cited to me on this point. I need only refer to one of them. In *Re Whitehead's Will Trusts*,[16] HWB was the beneficiary of an English trust contingent upon the death of his mother, aged 78. Should HWB predecease his mother, then the trust fund would be held in trust for his children provided they survive their grandmother and attain the age of 21 or marry. HWB and his family had upwards of 10 years been settled in Jersey and had every intention of remaining there permanently. The assets of the trust consisted of a hotel in Jersey. The retiring trustees appointed new trustees resident in Jersey. The beneficiaries were not concerned to argue or were desirous of arguing against the validity of the appointment. The retiring trustees came to court for sanction so as to be assured that what they had done was proper.

Pennycuick VC, in approving the appointment after holding that there was no absolute bar to the appointment of foreign trustees, said (at pp 1336-7):

> It is not in dispute that Mr Burke and his family are genuinely and indefinitely settled in Jersey. *It is not in dispute that the new trustees are fit and proper persons to act as such.* Then there was evidence on the summons by a Mr Bailhache, who is an advocate practising in Jersey, to the effect that the Jersey court would execute these trusts in accordance with the law of England rather than that of Jersey, ie although the local law of Jersey itself is quite different from that of England, should any question arise in connection with these trusts the court in Jersey would apply the law of England. Mr Bailhache is a well-known advocate, and it is accepted that the beneficiaries would be adequately protected by the Jersey court. Counsel for the first and second defendants based his contention entirely on the proper construction of s 36 of the Trustee Act 1925 to which I will return in a moment. Leaving aside that point, the law I think has been quite well established for upwards of a century, that there is no absolute bar to the appointment of persons resident abroad as trustees of an English trust. I say 'no absolute bar', in the sense that such an appointment would be prohibited by law and would consequently be invalid. On the other hand, *apart from exceptional circumstances, it is not proper to make such an appointment. That is to say, the court would not, apart from exceptional circumstances,*

make such an appointment: nor would it be right for the donees of the power, apart from exceptional circumstances, to make such an appointment out of court. If they did, presumably the court would be likely to interfere at the instance of the beneficiaries. There do, however, exist exceptional circumstances in which such an appointment can properly be made. The most obvious exceptional circumstances are those in which the beneficiaries have settled permanently in some country outside the United Kingdom and what is proposed to be done is to appoint new trustees in that country. In those exceptional circumstances it has, I believe, almost uniformly been accepted as the law that trustees in the country where the beneficiaries have settled can properly be appointed. (Emphasis added)

It is to be noted that even though in *Re Whitehead*,[16] new trustees had been appointed by the donees or holders of the statutory power under s 36 of the Trustees Act 1925 which is in pari materia with s 40 of the Trustees Act (Cap 337), the Vice Chancellor said that it would not be right for the donee to appoint out of court trustees who are out of the jurisdiction apart from exceptional circumstances and that if they did the court would be likely to interfere at the instance of the beneficiaries. In that case, there were exceptional circumstances: all the beneficiaries were permanently resident out of England, and the assets of the trust were in Jersey where the court was satisfied that the Jersey court would enforce the trust according to the law of England. In the instant case, the greater part and value of the assets of the family settlement are situated in Singapore and not all beneficiaries are living outside Singapore. Moreover, the second defendant, who is the moving force amongst HBT's nominees is resident in a jurisdiction, ie Cairo, Egypt, which has a system of law with which this court is not familiar. Here, far from there existing any exceptional circumstances in favour of appointing the second and fifth defendants, the circumstances of this case point to the need to adhere strictly to the general principle. I might add that the judgment of the Court of Appeal in *Re Gadd*[3] also supports the view that the residence of the proposed trustees is a matter of great importance.

Bona fides

I turn now to consider the question of the bona fides of HBT in nominating the second, fourth and fifth defendants. The first allegation that there might be collusion between HBT and their nominees is not substantiated by any direct evidence. However, I am not surprised that, given the prevailing circumstances, the plaintiffs are highly suspicious of HBT's selection of the second, fourth and fifth defendants for appointment. The first two circumstances are the suddenness of HBT's decision to retire, coming as it did shortly after the fourth defendant met an officer of the Hong Kong Bank in Hong Kong. This decision was made against the backdrop of the plaintiffs' action for their removal as trustees and for the appointment of a rival trustee corporation in their place. As HBT is a Singapore trustee corporation with its own management, it is reasonable to ask why it was necessary for the fourth defendant to bypass the officers of HBT in Singapore and to meet an officer of the holding company (presumably a more senior officer) in Hong Kong. No explanation has been given nor any disclosure made to the court of the purpose of this meeting. The third circumstance is that the reason given by HBT in their first circular for wanting to retire from the trusts, ie a substantial proportion of the beneficiaries wished them to resign. On that basis, one would have expected HBT to give, which they have not done, some consideration to the same or larger proportion of the beneficiaries who wish to appoint BMT in their place. The fourth circumstance is HBT's decision to appoint from the preferred class of beneficiaries, in line with the settlor's objectives in cl 20 which decision had the immediate effect of disqualifying both BMT as a candidate and the second plaintiff as a preferential candidate.

Singly or together, these circumstances, however suspicious they may appear in the eyes of the plaintiffs, do not prove collusion. But they are capable of proving that HBT might not have acted with that degree of detachment and impartiality expected of trustees who have represented to all the beneficiaries that they would 'propose to the court persons who in our opinion will be suitable and capable in taking over the trust'.

I come now to verifiable facts. HBT gave two reasons for rejecting the second plaintiff and three reasons for rejecting BMT. The first reason is common to both of them, ie they do not fall within the preferred class of candidates under cl 20. The second reason for not selecting the second plaintiff is that the nominations supporting the second plaintiff were submitted after 31 July 1988. The second reason for rejecting BMT is that BMT would face the same problems as HBT had encountered as trustees and that BMT would have difficulty in communicating with the beneficiaries living in the Middle East. The third reason is that BMT were one of the trust corporations nominated for appointment in OS 1269/85.

In relation to the first reason, it would not be possible in ordinary circumstances to fault any trustee in fulfilling his duty to give effect to the wishes of the settlor. However, in the instant case, one may be permitted to ask whether HBT, having decided to retire as trustees, had any need to do this when it can be done more satisfactorily and effectively by a court of law in the light of the pending action against them and the hostility amongst the beneficiaries. Clause 20 provides that new trustees shall be selected *as far as possible* from the sons and male issues of the sons of the settlor in preference to issues from the female line. Clause 20 does not compel HBT to select trustees from the preferred class in any

circumstances. In my view, the words 'as far as possible' do not merely refer to the availability of qualifying candidates who are willing and capable of acting; but also what is permissible or desirable under the law.

HBT's reasons for nominating the second, fourth and fifth defendants do not show that they have given sufficient consideration to what is permissible or desirable under the law. For example, in the light of the known hostility and distrust among the two groups of beneficiaries, nothing is said about whether they are satisfied that appointing the nominees would or would not impede the execution of the trusts or lead to more grievances, allegations etc. Furthermore, inadequate consideration appears to have been given to the meaning of the definition 'resident trustees' or whether the assurances of the second and fifth defendants that they would spend as much time as is necessary in Singapore is an exceptional circumstance sufficient to depart from the normal rule against appointing trustees resident outside the jurisdiction.

The second reason for not considering the second plaintiff is quite unworthy of a professional trustee. In my view, it is so irrational as to be perverse. The deadline of 31 July 1987 was entirely discretionary. However late the plaintiffs' nominations might have come in, but provided they did not come in after HBT had irrevocably made their decision, the delay did not and could not affect the ability of HBT to judge the nominations, fairly and impartially, in the best interest of all the beneficiaries. In contrast, it may be noted that whilst the circular gave the beneficiaries one and one half months to meet the deadline, HBT themselves did not make their decision or at any rate disclose it until the filing of S/C 443/89 on 23 January 1989, a period of more than five months from the closing date. The only inference I can draw from this episode is that HBT are trying their best to find reasons for rejecting the second plaintiff, when otherwise he would be fit and proper to be appointed.

The second reason stated for rejecting BMT, ie BMT was among the other trust corporations nominated for appointment in OS No 1269 of 1985, is wholly unsatisfactory, in the light of the evidence before the court. It would appear that Mr Nand Singh Gandhi of M/s Drew & Napier did not recommend BMT for appointment in OS 1269 of 1985 because of the adverse reports he had received arising out of litigation conducted by his firm involving the Alsagoff estate in OS No 314 of 1977 (see his affidavit filed on 24 February 1989). In the circumstances in which HBT found themselves in, ie an action by the plaintiffs for their removal as trustees, the proposed appointment of BMT in their place, the position of BMT as professional trustees in competition with HBT, it behoved HBT to act with care and caution consistent with their own professionalism, if they decided, which they did, to evaluate BMT's professional fitness for office. What the court has been presented with is an adverse judgment by HBT against BMT without a scintilla of evidence to support it. It is not even clear from the evidence whether HBT were aware of the substance of these allegations or whether they relied wholly on the opinion of Mr Nand Singh. One would have expected these allegations to be disclosed by affidavit to the court. It was left to counsel for the first to sixth plaintiffs to state from the bar (and the statement was not contradicted by counsel for HBT) that what had happened in OS No 314 of 1977 was that one of BMT's directors, who was also a trustee of the estate of Alsagoff, had misappropriated certain trust funds collected by BMT as collecting agents and that BMT had made good the loss and that the said defaulting director was no longer a director of BMT. That kind of defalcation could have occurred in any organization, and in any case since the incident took place more than ten years ago it could have no relevant bearing on the present integrity or professionalism of BMT.

The third reason given for rejecting BMT is based on a wrong premise and not supported by any evidence. It is true that BMT would have to deal with the same matters which were regarded as problems by HBT. But there is no evidence to suggest BMT would not be able cope with the said 'problems'. A great number of HBT's problems were generated by the alleged dissatisfaction of the plaintiffs against HBT. The plaintiffs had no such problems with BMT. Furthermore, the second defendant, who holds the powers of attorney of the beneficiaries resident in Hadramout, has nominated BMT as trustee and is in a position to assist BMT in matters relating to the said beneficiaries. Finally, there is evidence that BMT have some familiarity with people living in Hadramout as they have been and are co-trustees of the six Alkaff settlements, in which many of the beneficiaries are from and living in Hadramout.

Findings

Having, I hope, given full consideration to all the relevant matters and arguments in this application, I am of the view that HBT was in error in the following respects:

(a) in failing to give adequate consideration to the words 'as far as possible' in cl 20 of the indenture of family settlement. As a result, they have wrongly narrowed the candidates which qualify for appointment as trustees thereunder;

(b) in construing the words 'the trustees for the time being in Singapore' in cl 23 to mean trustees who need not be resident in Singapore so long as they are for the time being in Singapore, and thereby wrongly included the second and fifth defendants as qualifying beneficiaries for nomination;

(c) alternative to (b), in failing to apply the general principle that a person who is resident outside the jurisdiction should not be appointed as trustee, unless there are special circumstances (and there are none in this case);

(d) in rejecting BMT and the second plaintiff as qualifying candidates by reason of (a) above and also on the wholly unjustifiable reasons given by them.

In view of these errors, I am of the view that HBT have failed to exercise their power of appointment properly and that two of their nominees, viz the second and the fifth defendants, are not proper persons to be appointed as trustees. Accordingly, I decline to appoint HBT's nominees as a group. In the event, although I have expressed some degree of scepticism and criticism of the conduct of HBT and their nominees, I have found it unnecessary to express any concluded judgment on matters not specifically mentioned in the above findings, eg the fitness of HBT's nominees in terms of their character and integrity.

In the event that has occurred, the court should, following *Re Gadd*,[3] refer the matter back to HBT to make fresh nominations. However, there is no necessity to do so, as HBT have, both in this application and in their counsel's answer to a question from the court, decided to invite the court to make its own nomination in the event that has occurred. I accept the invitation which I consider a wholly desirable course to adopt in the circumstances of this case. As there is no real dispute about BMT's professionalism and fitness to act as trustees, I have decided to appoint BMT as the sole trustee of the family settlement in place of HBT on terms of remuneration set out in their letter of 3 April 1987. HBT are given leave to retire as trustees from today. There will be an order in these terms. I will now deal with the necessary consequential orders and directions and hear arguments on the costs of this application.

Order in terms.

Solicitors: *Abraham Low & Partners*; *Lee & Lee*; *Tan, Rajah & Cheah*; *Oehlers & Choa.*

Reported by *Terence Tan Bian Chye*

Tay Cheow Seng v Lee Puey Hwa

HIGH COURT (SINGAPORE) – DIVORCE NO 26 OF 1985
LAI KEW CHAI J
28 MARCH 1989

Family Law – Divorce – Maintenance of wife – Factors to be considered – Present and future financial obligations of husband – Needs of husband's new family – Likelihood of wife remarrying – Women's Charter (Cap 353, 1985 Ed), ss 108(1)(a)-(g) & 109(1) – Matrimonial Proceedings Rules 1981, r 40(1)

The petitioner had filed for the dissolution of the marriage. The petitioner and the respondent had a child who was self-supporting. The respondent filed an answer asserting that the marriage had broken down because of the petitioner's adultery with the party-cited, who had borne him two sons. The Chief Justice ordered the petitioner to pay the respondent maintenance at $1,000 pm pending the hearing of the divorce petition. Later, the present judge increased the amount to $1,400 pm pending the conclusion of the hearing of the application for maintenance. The respondent sought final maintenance under the Women's Charter either at a monthly rate or for a lump sum equal to ⅓ of the capital worth of the petitioner. The petitioner filed an affidavit listing his expenses and his assets which included shares in private companies.

Held, awarding maintenance of $1,800 a month to the respondent:

(1) All the circumstances of the case should be taken into account. So far as the respondent is concerned, the principal matter is her financial needs, seeing that she had never worked and will not be able to work.

(2) As for the petitioner, his income and earning capacity and his obligations to his other family should be looked at. The fact that the petitioner has remarried with two sons has to be considered in terms of his financial obligations and responsibilities which he has or is likely to have in the foreseeable future.

(3) As each case had its own peculiar characteristics, references to case law serve only as a guide. For a start, ⅓ of the joint income of both parties should be ordered as maintenance for a former working wife. Different considerations must apply where she does not work and will not be able to, as in this case.

(4) The respondent was a very frugal person, and her evidence that she was not adequately maintained during the period before divorce (being given $800 a month) and that she had to seek financial assistance from others was accepted.

(5) Considering all the circumstances, the petitioner should pay the respondent maintenance of $1,800 pm.

(6) As regards the respondent's application for a lump sum, none should be paid. This was because the petitioner's wealth was largely inherited and his own acquisitions were achieved in the course of his professional practice, with considerable help from the party-cited, during a period when his marriage to the respondent was over to all intents and purposes. In addition, the shares in the private companies were not easily realizable.

(7) However, to secure the maintenance to the respondent who, being a traditional Chinese lady, was unlikely to remarry, the petitioner was ordered to hold the income of his shares in the private companies as trustee upon trust to pay the maintenance, and subject thereto, he was free to deal with the residue. Costs were to be paid by the petitioner to the respondent.